IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY JEROME JOHNSON, Appellant.	No. 37714-4-II UNPUBLISHED OPINION

Bridgewater, J. — Jeffrey Jerome Johnson appeals his convictions of unlawful delivery of a controlled substance—methamphetamine, and unlawful use of drug paraphernalia. We affirm.

FACTS

Jeremy Duryea, an established police informant, told law enforcement officers that he could buy methamphetamine from Jeffrey Johnson. On March 1, 2007, before a controlled buy,

Duryea had met with Deputy Duncan Adkisson and Detective Kevin Engelbertson. The officers strip searched Duryea and searched his vehicle to ensure that Duryea did not have any contraband or money that would interfere with the controlled buy. Neither officer found any contraband. Deputy Adkisson then gave Duryea "buy funds" for the controlled buy. I RP at 14.

The officers followed Duryea to Johnson's house. Duryea entered a barn on the property with Johnson and eventually emerged. The officers followed Duryea away from the house and again searched him and his vehicle. Duryea gave Deputy Adkisson a baggie containing a crystalline substance that Johnson allegedly sold to him. The officers did not find any other contraband.

On March 2, the officers again met with Duryea and again searched him and his vehicle. The officers did not find any contraband on Duryea's person or in his car. Deputy Adkisson gave Duryea $160 in "buy funds" and placed a digital recording device on his person. I VRP at 18. The officers followed Duryea to Johnson's house, where Duryea allegedly purchased an "eight ball" of methamphetamine from Johnson. I VRP at 58. No one else was in the room when Johnson sold the drugs to Duryea.

The officers followed Duryea back to a meeting place. There, Duryea gave the officers a baggie containing a white crystalline substance that field tested positive for methamphetamine. Duryea stated that he bought the drugs from Johnson.

The State charged Johnson by amended information with two counts of unlawful delivery of a controlled substance—methamphetamine and one count of unlawful use of drug paraphernalia.

At trial, the State played the March 2, 2007 recording. On the recording, Duryea asked Johnson for a "fat ass eight ball" of methamphetamine. I VRP at 58. Duryea then counted out $160, and said "fucking A, buddy," in appreciation for Johnson "hooking [him] up fat. . . .[with] a good size quantity" of methamphetamine. I VRP at 58.

Johnson testified and denied meeting with Duryea on March 1, 2007, or selling Duryea drugs either day. He insisted that he sold Duryea speaker stuffing on March 2.

The jury found Johnson guilty of delivery of a controlled substance (count II) and unlawful use of drug paraphernalia (count III), but acquitted him on delivery of a controlled substance (count I).

ANALYSIS

I. Ineffective Assistance of Counsel

A. Duryea's Testimony

Johnson first argues that he received ineffective assistance of counsel because his trial attorney failed to object to testimony that (1) a third party attempted to influence Duryea's testimony or prevent him from testifying and (2) a third party's conduct caused Duryea to fear for the safety of his three-year-old son.

To prove ineffective assistance of counsel, Johnson must show (1) trial counsel's deficient performance and (2) prejudice. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton,* 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the

trial result would have differed, thereby undermining our confidence in the outcome. *Strickland,* 466 U.S. at 694. If Johnson fails to establish either element, we need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Legitimate trial strategy or tactics cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

During Duryea's testimony, the State played the recording from the March 2 controlled buy. The State then asked Duryea:

> Q Have you ever heard that recording before?
> A Yes, I have.
> Q When did you hear that recording?
> A I was in Onalaska here a couple of days ago at a guy's house I know, another gentleman I know brought it in on a laptop he had and played it for me.
> Q Were you expecting it?
> A No — yeah, yes, I was.
> Q What was the implication of that?
> A I don't know what his implication of it was at all, maybe to try to scare me into not coming here today. I could point that gentleman out for you, he's here today, too.
> Q Is he in the courtroom today?
> A Yes.
> Q Where is he?
> A Sitting right over there with the sunglasses on.
> Q In the gallery?
> A Yes.
> Q Are you scared to be here today?
> A I'm scared for my three-year-old son, yes, I am.

I VRP at 59-60. Johnson never objected.

Johnson argues that Duryea's testimony about the third party's attempts was inadmissible because under *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945), Johnson had to make

the statements or encourage a third party to make the statements that attempted to influence Duryea's testimony. Johnson contends that because the State did not produce any testimony that he was responsible for the third party's actions, the evidence was inadmissible and his trial counsel should have objected. Johnson also argues that Duryea's testimony about his fear for his three-year-old son was inadmissible because its prejudicial effect outweighed any relevancy. He argues that there was no tactical reason not to object or move to exclude Duryea's testimony.

To establish ineffective assistance of counsel for failure to object, the defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A defendant's conduct, or that of someone acting at his or her request or with his or her knowledge and consent, that intends to prevent a witness from appearing and testifying is relevant and admissible because such conduct is inconsistent with innocence. *Kosanke*, 23 Wn.2d at 215.

In *Kosanke*, the Supreme Court found relevant testimony that the defendant's wife had encouraged the victim and her family to move out of state to avoid being subpoenaed. *Kosanke*, 23 Wn.2d at 216. The court found the testimony admissible because evidence indicated that Kosanke's wife acted on his behalf or at his direction. *Kosanke*, 23 Wn.2d at 216. Specifically, the court relied on the fact that Kosanke and his wife both contacted the victim's parents about moving and both visited the victim's parents at their workplaces and had a similar conversation. *Kosanke*, 23 Wn.2d at 216. The court also relied on the fact that Kosanke's wife returned to the parents' workplace and reported conversations she had with Kosanke about how the wife and victim had to get Kosanke out of trouble. *Kosanke*, 23 Wn.2d at 216.

Here, the State argues that there is no evidence the trial court would have sustained an objection on this testimony because there is an inference that the third party acted on Johnson's behalf as the third party had a copy of the recording and could only have obtained it from Johnson. But the evidence does not support this inference. Unlike *Kosanke*, there is no evidence that Johnson encouraged the third party to contact Duryea or that Johnson was present when the third party did so. Duryea did not testify that the third party acted on Johnson's request or with his knowledge and consent. Therefore, Duryea's fear was not admissible to show Johnson's guilt.

But the statements were admissible to bolster Duryea's credibility.[1] Evidence that a witness is fearful or reluctant to testify because of threats is relevant if the witness's credibility has been challenged. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). In *Bourgeois*, the State elicited testimony on direct examination from several witnesses that they feared testifying and had only shown up because the State had arrested them on material witness warrants. *Bourgeois*, 133 Wn.2d at 393-96. On appeal, the Supreme Court found no connection between Bourgeois and the witnesses' reluctance to testify. *Bourgeois*, 133 Wn.2d at 400. In addition, the court held that most witnesses' testimony was inadmissible because Bourgeois had not and likely would not have attacked their credibility. *Bourgeois*, 133 Wn.2d at 400-01. But the court found one witness's testimony admissible because Bourgeois had attacked his credibility on cross-examination. *Bourgeois*, 133 Wn.2d at 402. The court held that "[a]lthough the attack occurred after [the witness] was directly examined by the State, it was reasonable for the State to anticipate the attack and 'pull the sting' of the defense's cross-examination." *Bourgeois*, 133

[1] The State does not raise this argument, but this court can affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Wn.2d at 402.

Similarly, Johnson attacked Duryea's credibility. When questioning Deputy Adkisson and Duryea, Johnson elicited testimony about Duryea's criminal history and Duryea's previous work as a confidential informant to work off prior crimes. During cross-examination of Duryea, Johnson tried to get Duryea to admit that the March 2, 2007 transaction really involved the sale of speaker stuffing and not the sale of methamphetamine. Johnson also questioned Duryea about a party that was supposedly being thrown for Duryea before he reported for jail. On appeal, Johnson asserts that the case largely rested on credibility. Duryea's credibility was therefore relevant and the evidence about Duryea's fear admissible. The State did not have to wait until after Johnson questioned Duryea to provide credibility-boosting testimony. *Bourgeois*, 133 Wn.2d at 402. Duryea's testimony was relevant and admissible and the trial court likely would not have sustained any objection. Johnson cannot show that his counsel's performance was deficient. *Saunders*, 91 Wn. App. at 578.

Johnson also argues that Duryea's testimony about Duryea's fear for his three-year-old son was improper character evidence because it implied that Johnson was culpable and "that he was a violent and dangerous person." Br. of Appellant at 19. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. ER 404(a). The State and Duryea never indicated that Johnson was a dangerous or violent person or that he had a history of violence. In fact, Duryea never stated whom he feared. Duryea's testimony was not improper character evidence. Because Johnson's counsel's performance was not deficient, we need not address the prejudice prong. *Davis*, 152

Wn.2d at 673. We hold that Johnson did not receive ineffective assistance of counsel.

B. Dunn's Testimony

Johnson also argues that he received ineffective assistance of counsel because the State's forensic scientist testified about how to manufacture methamphetamine even though that was not a charged crime. Johnson contends that this testimony amounted to improper character evidence because it implied that Johnson manufactured methamphetamine. But Johnson's counsel objected to the testimony to which he assigns error and the trial court denied that objection. Johnson cannot show deficient performance. *Saunders*, 91 Wn. App. at 578. Because trial counsel's performance was not deficient, we need not address the prejudice prong. *Davis*, 152 Wn.2d at 673.

II. Prosecutorial Misconduct

A. Vouching

Next, Johnson argues that the prosecutor committed misconduct because he allegedly (1) vouched for Duryea's credibility and (2) argued facts not in evidence.

An appellant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). When determining the prejudicial effects of the prosecutor's comments, we look at the remarks in context of "the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 132 Wn.2d at 561. In addition, where a defendant fails to object to an improper comment, he waived

any error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. *Brown*, 132 Wn.2d at 561.

During closing arguments, the prosecutor said:

> You guys heard from Jeremy Duryea. Think to yourself, well, how do you catch a drug dealer. To the extent that Mr. Duryea didn't appear — he was here in a sweatshirt, he was nervous because someone had played for him the wire the week before, essentially, intimidated him. He showed up anyway, told you what he knew *and told it accurately*. The credibility of the witnesses is your job.

II VRP at 46 (emphasis added). Johnson did not object. Johnson argues that by stating that Duryea testified "'accurately,'" the prosecutor improperly vouched for Duryea's credibility. Br. of Appellant at 27.

In closing argument, the State has wide latitude in drawing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996). We will not find prejudicial error unless it is "clear and unmistakable" that counsel is expressing a personal opinion and not arguing an inference from the evidence. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

In *State v. Jackson*, 150 Wn. App. 877 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009), one of the key issues was whether to believe the police officers or a defense witness. *Jackson*, 150 Wn. App. at 883. During closing arguments, the prosecutor three times stated that the police testified accurately. *Jackson*, 150 Wn. App. at 884. We held that the prosecutor did not vouch for the officers' credibility because, looking at the argument in context, the prosecutor

reminded the jury that it was the sole judge of credibility and then outlined which evidence could support the jury's conclusion that the officers were credible. *Jackson*, 150 Wn. App. at 884-85.

Similarly, the prosecutor argued an inference from the evidence. Whether to believe Johnson or Duryea was a key jury issue. The prosecutor stated that Duryea testified accurately and laid out the reasons, supported by specific evidence, why he was credible. In addition, the prosecutor reiterated that the jury remained the evaluator of witness credibility. The prosecutor did not vouch for Duryea and did not commit misconduct. The statements were also not flagrant and ill-intentioned misconduct.

B. Facts Not in Evidence

In addition, Johnson argues that the prosecutor committed misconduct by arguing facts not in evidence. While discussing the elements on the "to convict" jury instructions for unlawful delivery of a controlled substance, the prosecutor stated:

> That the defendant knew the substance delivered was a controlled substance. Interesting thing about this is that his own testimony, Mr. Johnson's own testimony, then you heard the rest of the wire, where he talked about things such as how he makes nectar, he knew what an eight ball was because he sold him an eight ball. He actually had some knowledge about how you make the stuff, the titrate, which is the gas you heard from Mr. Dunn told you that's one method of making methamphetamine. Mr. Johnson knew exactly what he was talking about.

II VRP at 50. Johnson did not object.

Johnson argues that the evidence did not support the statements that he "knew exactly what he was talking about" and "actually had some knowledge about how [to] make the stuff" improperly implied that Johnson manufactured methamphetamine. Br. of Appellant at 27-28. Johnson argues that these statements improperly influenced the jury because it acquitted him on

count I, so there is a substantial likelihood that the comments influenced the jury on the other two counts. He also contends that no jury instruction could have cured the prejudicial effect of these statements.

The prosecutor's comments are reasonable inferences from the record. Johnson stated in the audio recording that he "titrate[d]," and admitted at trial that he knew titrating was involved in the manufacture of methamphetamine. II VRP at 38. The State then brought in Jason Dunn, a forensic scientist with the Washington State Patrol crime laboratory, to explain how to "titrate" a substance when making methamphetamine. II VRP at 43-44. The prosecutor could reasonably argue, then, that Johnson had knowledge of manufacturing methamphetamine.

To the extent there was any error, Johnson invited it. Improper prosecutorial remarks are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Weber*, 159 Wn.2d 252, 276–77, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). The State had to show that Johnson knew he delivered a controlled substance. Johnson claimed that he did not sell drugs and that the transaction police recorded was for the sale of speaker stuffing. But, on the audio recording, Johnson stated, "I titrate." II VRP at 38. Johnson claimed that he said that to "bullshit[ ]" Duryea. II VRP at 38. The prosecutor then asked Johnson, "That's how you make methamphetamine, isn't it?" and Johnson replied, "I have heard that, but that doesn't mean that — I don't make meth." II VRP at 38. By denying that he sold drugs or that a drug transaction occurred, Johnson invited testimony and argument about his knowledge of methamphetamine.

The prosecutor could therefore argue from the evidence that Johnson had knowledge of methamphetamine manufacturing and was in fact talking about manufacturing methamphetamine.

Johnson cannot demonstrate that the prosecutor's comments were misconduct or "flagrant and ill-intentioned." *Brown*, 132 Wn.2d at 561. We hold that the prosecutor did not commit prosecutorial misconduct.

IV. Statement of Additional Grounds (SAG)

In his SAG, Johnson argues that the prosecutor committed misconduct by not providing him with a recording of the controlled buy until shortly before trial. There is no evidence in the record indicating when the State turned over the recording. We cannot review matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Johnson also argues that he received ineffective assistance of counsel where his trial attorney did not file a motion to suppress the recording of the controlled buy when the police deviated from standard procedure. He contends that because the police lost visual contact of Duryea during the drive back from Johnson's house on March 2, 2007, the police failed to follow procedures for controlled buys.

We do not presume that a CrR 3.6 hearing is necessarily required in every case. *McFarland*, 127 Wn.2d at 336. Thus, failure to move for a suppression hearing is not per se deficient representation. *McFarland,* 127 Wn.2d at 336. If counsel's conduct can be characterized as legitimate trial tactics or strategy, that conduct cannot serve as the basis for a claim of ineffective assistance of counsel. *Mak*, 105 Wn.2d at 731.

While Johnson's counsel did not file a motion to suppress the recording, he did challenge

the credibility of the recording, Duryea's credibility, and the officers' procedures on cross-examination. It arguably was a tactical decision by Johnson's counsel to argue before the jury that the police bungled the controlled buy and that Duryea was not credible. We hold that Johnson did not receive ineffective assistance of counsel.

Johnson also contends that the trial court abused its discretion when it denied his request for a new attorney at a pretrial hearing. He contends that the trial court should have asked him why he wanted a new attorney and appointed new counsel when he could not retain hired counsel. Johnson claims that he felt his appointed attorney could not adequately represent him because allegedly the attorney expressed discomfort cross-examining State witnesses because they were his friends.

This court cannot review matters outside the record on direct appeal. *McFarland*, 127 Wn.2d at 335. Johnson never told the trial court his concerns with appointed counsel and the record does not reveal any such conflicts. If Johnson wishes review on this subject, he must file a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

III. Cumulative Error

Finally, Johnson argues that these cumulative errors produced an unfair trial. Cumulative error applies when several trial errors, when combined, denied the defendant a fair trial, although none of them alone would justify reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because Johnson has not established that multiple errors occurred at trial, we do not reverse under the cumulative error doctrine.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.